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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1089

BATES BLOCK, *et al.*,

Petitioners,

versus

COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Treaty Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	31

TABLE OF AUTHORITIES

Cases:

Alitalia-Linee Aeree Italiane, S.p.A. v. Lisi, No. 70	9
American Airlines v. Ulen, 186 F. 2d 529 (D. C. Cir. 1949)	10
The Amiable Isabella, 19 U. S. (6 Wheat.) 1 (1821)	9, 10
Bacardi Corporation v. Domenech, 311 U. S. 150 (1940)	12
Curtis-Wright Flying Service, Inc. v. Glose, 66 F. 2d 710 (3rd Cir.), *cert. denied*, 290 U. S. 696 (1933)	13
Factor v. Laubenheimer, 290 U. S. 276 (1933)	9, 12
Haver v. Yaker, 76 (9 Wall.) 32 (1869)	12
Kolovrat v. Oregon, 366 U. S. 187 (1961)	14
New York Central Railroad Co. v. Lockwood, 84 U. S. (17 Wall.) 357 (1873)	13
Noel v. L.A.V., 247 F. 2d 677 (2d Cir. 1957), *cert. denied*, 355 U. S. 907 (1957)	13
Pekelis v. Transcontinental and Western Air, Inc., 187 F. 2d 122 (2d Cir. 1950)	10

PAGE

Perkins v. Elg, 307 U. S. 325 (1939) 9, 12

Stratton v. Trans Canada Air Lines, 7 Avi. Cas. 17, 724 (Br. Col. S. Ct. 1961) 14

Strother v. Lucas, 37 U. S. (12 Pet.) 410 (1938) 12

Statutes and Treaties:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 U. S. Stat. at L. 3000, 3014 ..... 3, 7

47 U. S. Stat. at L. 1901 11

49 U. S. Stat. at L. 3279 11

Books and Treaties:

Ambrosini, Fletamento y Transporte, Aeronautica Argentina, IDAN/9 (Buenos Aires, 1951) 16

Coquoz, Le Droit Prive International Aerien (Paris 1938) 16

Drion, Limitation of Liability in International Air Law (1954) 21

Pergler, Judicial Interpretation of International Law (MacMillan Co., 1928) 12

Reemts, Charter, Hire and Interchange of Aircraft (McGill 1956) 29

Sundberg, Air Charter (1961) 15, 16, 24, 25, 29

Articles:

Air Carriers' Limitation of Limitation of Liability and Air Passengers' Accident Compensation, Peter H. Sand, 28 Journal of Air Law & Commerce 260 (1961-62) 7

PAGE

Air Law Conventions and the New States, Renih Mankiewicz, 29 Journal of Air Law & Commerce 52 (1963) 11

New York Times, January 13, 1968 7

The Warsaw Convention and the Washington Compromise, A View from America, Andreas F. Lowenfield, 10 Journal of the Royal Aeronautical Society 1061 (1966) 7

Archives Documents:

Archives 579.6LI/24 ..... 17, 18, 27
Archives 579.6LIA/22½ 18
Archives 579.6LIA/60 27
Archives 579.6LIA/84 18
Archives 579.6LIA/114½ 24
Archives 579.6LIA/145 24
Archives 579.6LIA/148 24
Archives 579.6LIA/242 24
Archives 579.6LIA/339 25
Archives 579.6LIA/344 25
Archives 579.6LIA/382 26
Archives 579.6LIA/444 26
Archives 579.6LIA/1302 27
Archives 579.6LIA/1655 29
Archives 579.6LIA/1814 29
Archives 579.6L2/36 24
Archives 579.6L2/37 24
Archives 579.6L2/39 24
Archives 579.6L2/52 23
Archives 579.6L2/68 23
Archives 579.6L2/73 ..... 19, 21
Archives 579.6L2/78 23
Archives 579.6L2/80 23

PAGE

CITEJA Documents:

CITEJA Doc. 4 18

CITEJA Doc. 197 26

CITEJA Doc. 328 27

CITEJA Doc. 423 29

CITEJA Doc. 445 29

ICAO Documents:

ICAO Doc. 4003 ..... 18, 29

ICAO Doc. 6024—LC/121 29

ICAO Doc. 7229—LC/133 29

ICAO Doc. 7686 30

Miscellaneous:

Civil Aeronautics Board, 10 CAB 783, 788 (1949) .. 13, 14

1966 World Air Transport Statistics, International Air Transport Association, Montreal, Canada .. 7

17 IATA Inf. Bull. 42 (Hague 1932) 24

State Department Bulletin of Treaty Information #7 ..... 19, 21

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COMPAGNIE NATIONALE AIR FRANCE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on January 19, 1968 upon decision rendered on November 8, 1967.

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[1] Additional petitioners are: Henry C. Berry; Ewing S. Humphreys; F. C. Terrell; John M. Luty; Ezekiel Samuel Candler; Fred H. Sorrow; Ralph J. Barry; Citizens & Southern National Bank; Trust Co. of Georgia; First National Bank at Winter Park; Hinton F. Longino; David C. Black; William King Self; Robert P. Turner, Jr.; Claire W. Morse; Sartain Lanier; Henry L. Bowden; James T. Anderson; Thomas G. Moore; Robert L. Gerson; William Eaton Merritt; Carroll Young Cargile; Tom-Chris Allen; Center C. Williamson; Jake Goldstein; Frank E. Loomis; Percy H. Perkins; Frank Virgin; First National Bank of Atlanta; Bank of Georgia; Fulton National Bank of Georgia; First National Bank of Georgia; and Rosa M. Baskett.

Citations to Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix C (A. 58a-118a)[2], has not, as of today, been reported. The opinion of the United States District Court for the Northern District of Georgia, printed in Appendix B (A. 32a-57a), is reported in 229 F. Supp. 801.

Jurisdiction

The decision of the Court of Appeals was rendered on November 8, 1967 (A. 119a-120a) and judgment entered on ~~January 29, 1968~~ that day. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Questions Presented

1. Does the Warsaw Convention cover charter relationships?

2. Should a treaty which derogates and restricts private rights be "broadly construed" in accordance with French civil law principles so as to extend its application or should it be limited to the intent of its drafters?

3. Does the fact that a charter is arranged so as to resemble typical individual transportation serve to bring the charter under the Convention when the intent of the drafters was to place charters outside the scope of the Convention?

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[2] References designated "A." are to the appendix to this petition, which because it is voluminous, is separately presented. Sup. Ct. R. 23. References designated "R." are to the transcript of the record. References to exhibits filed by petitioners, below, on the motion for summary judgment will be made by the letters "SJX" followed by the number.

Treaty Involved

This case raises an issue involving the Warsaw Convention.[3] The full text in the English translation is printed as Appendix A. (A. 1a-31a).

Statement

Petitioners instituted 45 actions which were consolidated in the United States District Court for the Northern District of Georgia to recover damages for the wrongful deaths of sixty-two passengers in the crash of an airplane owned and operated by respondent Air France at Orly Airport, Paris on June 3, 1962. The destination of the fatal flight was Atlanta, Georgia (A. 58a). The aircraft had been chartered by the Atlanta Art Association from the respondent under a charter contract which provided that a Boeing 707 Intercontinental Jet Aircraft "shall be furnished to charterer" (Atlanta Art Association) for a flight from Atlanta to Paris and return at a cost of $36,000 (A. 58a). Petitioners are citizens of the State of Georgia and respondent is a French corporation with its principal place of business in France. Jurisdiction of the District Court is based on diversity of citizenship, 28 U.S.C. § 1332(a)(2).

Respondent Air France answered petitioners' complaints asserting three defenses, (1) that the flight was governed by the Warsaw Convention limiting recovery to a maximum of $8,291.87 for each person killed; (2) that the contract of carriage (as set forth in the Charter Flight Agreement or in the ticket or in both) incorporated by reference

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[3] Officially entitled "Convention for the Unification of Certain Rules Relating to International Transportation by Air," signed by representatives of 23 countries on October 12, 1929, adhered to by United States October 29, 1934, 49 U. S. Stat. at L. 3000-3026, p. 3014 (1935).

the Warsaw limitation; and (3) that the law of France where the accident occurred governed the case and under French law the Warsaw limitation was applicable. Petitioners filed a motion for partial summary judgment dismissing each of these defenses (R. 184). This motion was denied by the District Court (A. 32a-57a). The opinion of the District Court included a certification that the decision involved a controlling question of law concerning which there is substantial ground for difference of opinion and that an immediate appeal from this decision might materially advance the termination of the litigation (A. 57a). Petitioners' application for leave to appeal pursuant to 28 U.S.C. § 1292(b) was granted by the Court of Appeals for the Fifth Circuit on June 5, 1964 (R. 351).

Petitioners contended that the drafters of the Warsaw Convention did not intend to include charter flights within the Convention and that the question of chartering was deferred for further study and consideration in a future convention; that historical evidence demonstrated the drafters' intention to put the entire chartering question aside as one too complex and too premature to be considered within the limited scope of a first convention directed only to the normal individual contract of carriage; that the efforts of intergovernmental agencies subsequent to the signing of the Convention in 1929 demonstrated a continued interest in the question of chartering and that repeated efforts to formulate a convention, totally aside from the Warsaw Convention, to deal with chartering, gave rise to the clear inference that chartering had not been included within the Warsaw Convention.

Petitioners further argued that the conduct of the airlines in resorting to ticketing procedures for charter flights similar to those used in individual non-charter flight was an effort at artificial compliance with the terms of the Convention as well as a tacit admission by the airline enterprise that the Warsaw Convention did not include chartering.

Petitioners further contended that the drafters of the Warsaw Convention contemplated only the normal two party relationship based on a contract of carriage between the airline and the passenger and that this concern was reflected in the language and the structure of the Convention; that the language and the structure of the Convention as well as its history show that they intended not to cover any charter relationships; and that no amount of attempted artificial compliance by the airline with the appearance of traditional individual transportation would bring these charter relationships under the Convention.

Respondents on the other hand argued that the particular flight in question came within the terms of the convention; that the history of the Convention did not demonstrate an intention to exclude the entire issue of chartering from the Convention; that the Convention simply required a two party relationship which existed here, in that the Atlanta Art Association was either merely an agent for the members of the Association in negotiating the contract or that the Association was a mere nominal party which faded into "nothingness" after the contract was made.

Respondents initially argued that the Convention was clear and unambiguous and included all international transportation that met the geographical and ticketing requirements of the treaty. Later they took the position that charters wherein the charterer sold the space which he had obtained on the aircraft, which were referred to below as "European" type charters, were not included in the Convention.

The Court of Appeals affirmed the District Court in a two to one decision, with Judge Jones dissenting. The majority reasoned that the Warsaw Convention should be broadly construed to give it uniform application in accordance with the principles of French civil law (A. 68a-69a). Under this broad interpretation the court concluded that

some charters were within the scope of the Convention. The court reasoned that the nature of the relationship contemplated by the Convention between the operator and the passenger should be measured by civil law standards, and by civil law standards the requisite relationship existed in this case (A. 69a-77a).

Turning to the history of the Convention the court concluded that chartering was within the Convention, but the drafters left out of the Convention the determination of who the "carrier" was in a charter relationship (A. 90a-105a). In examining the history of the Convention the court suggested and perhaps even concluded that European type charters were not within the Convention but the charter in question was (A. 101a).

Having thus resolved the issue of the applicability of the Warsaw Convention the majority of the court did not consider the other defenses of French law and limitation by contract.

Judge Jones, in dissenting, first indicated that he would strike the defenses relating to French law and contract on grounds of public policy and choice of law. Turning to the Warsaw Convention defense he indicated his disagreement with the broad construction approach of the majority. He said that where, as here, the meaning of a treaty depends on construction, the meaning adopted should be that which is least restrictive of the rights of individuals and that which is consistent with a generally prevailing rule of public policy rather than one which should override it. He concluded that a treaty is to be construed in the light of the conditions and circumstances existing at the time of its drafting and they were such "as to make it improbable that charter flights were within the contemplation of those who made the treaty" (A. 116a-118a).

Reasons for Granting the Writ

1. This is an important question under an important treaty.

The issue of whether charters are within the Warsaw Convention is one of international importance. The Convention has been adhered to by more than ninety nations.[4] Its importance to the rights of American citizens is indicated by the fact that about half of the international passenger air travel is done by United States citizens.[5]

Air charters, the subject of this suit, constitute a large segment of international air travel. For example, over ten per cent of all air passengers traveling over the world's busiest travel route, the North Atlantic, fly on charter flights.[6] This is more than the total number of passengers carried by ships over the same route.[7] The prospect of international charter flying enlarging dramatically awaits the outcome of this Court's decision on the power of the Civil Aeronautics Board to authorize supplemental air carriers to carry inclusive tour charters.[8]

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[4] In *Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention,* an article in 28 Journal of Air Law & Commerce 260 (1961-62), Peter H. Sand, the author, said "The 'Warsaw Convention' of 1929 is today the most widely accepted treaty on international commercial law." (p. 260) At that time the Convention was in force in 57 states; as of mid 1967, it was in force in 93 states.

[5] *The Warsaw Convention and the Washington Compromise, A View from America,* Andreas F. Lowenfeld, formerly Deputy Legal Adviser, U. S. Department of State, 10 Journal of the Royal Aeronautical Society 1061 (1966).

[6] *1966 World Air Transport Statistics,* International Air Transport Association, Montreal, Canada. In 1966, the total number of passenger crossings across the North Atlantic in chartered aircraft operated by members of I.A.T.A. was 502,896.

[7] New York Times, January 13, 1968. Article based on the *1966 World Air Transport Statistics* and statistics supplied by the Trans-Atlantic Passenger Steamship Conference.

[8] No. 800 World Airways v. Pan American World Airways, No. 949 Civil Aeronautics Board v. Pan American World Airways, No. 969 American Society of Travel Agents v. Pan American World Airways.

2. The case was improperly decided below.

The court below took over two and a half years to decide that the Convention applied to charter flights, and it did so by a divided vote. Circuit Judge Jones, dissenting, expressly concluded that the Convention does not apply under a contract of carriage on a voyage charter flight (A.116a-118a).

The case is admittedly one of first impression and not surprisingly, since the amount of relevant historical material presented was so imposing. This case itself consists of forty-five consolidated cases involving claims for wrongful death of sixty-two passengers.

Nevertheless, abandoning tenets of treaty construction well accepted and frequently propounded by this Court, the court below announced and followed "the primacy of the French legal system", which, admittedly, has a doctrinal basis different from that of United States law (A. 69a), to give "a broad construction" to the Warsaw Convention.

Without authorization in the treaty itself, or in any decision of this or any other court, and citing only a Swedish author who was concerned with the meaning of words rather than concepts of broad or strict construction of treaties, the court below said:

> "The binding meaning of the terms is the French legal meaning. 'The principle of the primacy of the French legal system thus means a harmonizing construction of the Convention.' This principle should not be carried to extremes, but '[u]niformity may be maintained without many futile disputes as to whether, why, and when resort to the teachings in Paris should be made.' The necessity for maintaining uniformity, even when the Convention is applied in a country, such as the United States, having a doctrinal basis for its legal system different from civilian systems, compels a broad construction of the Convention." (A. 69a)

Then, applying this "broad construction", the court below swept aside the plain impact of the Convention's history and the explicit intent of its drafters, and applied the Convention to charter relationships. Instead of considering whether the drafters of the Warsaw Convention intended to cover charter flights the court below examined the particular means employed by respondent, including the delivery of a standard form ticket, to create the appearance of a regular passenger contract of carriage. The court thereby abandoned the test of intent in favor of a test of artificial compliance. The court below added to the treaty what the drafters had taken out.

3. This Court is currently examining this treaty.

This Court already has before it a significant question of interpretation of the Warsaw Convention involving the same form ticket as was given by the airline herein to its passengers in an effort to demonstrate compliance with the ticketing requirements of the treaty, *Alitalia-Linee Aeree Italiane, S.p.A.* v. *Lisi*, No. 70.

While thus considering *Lisi* the court should also consider the parallel question of whether charter flights, which now constitute a significant part of international aviation come within the Convention at all.

4. The Court below has abandoned the tradtional test of treaty interpretation.

a. The proper test is legislative intent.

This Court has held that treaties should be construed to give effect to the intent of the drafters, *Factor* v. *Laubenheimer*, 290 U. S. 276 (1933); *Perkins* v. *Elg*, 307 U. S. 325, 337 (1939); *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1 (1821).

In keeping with this principle, the courts, when interpreting the Warsaw Convention have turned to its his-

tory to ascertain this intent. *American Airlines* v. *Ulen*, 186 F. 2d 529 (D. C. Cir. 1949); *Pekelis* v. *Transcontinental and Western Air, Inc.*, 187 F. 2d 122 (2d Cir. 1950).

b. *The Court below inserted a casus omissus into the treaty.*

The Warsaw Convention does not mention charter relationships or charter flights, or charter agreements or charterers.

The historical material demonstrates a deliberate design on the part of the drafters, to leave the question of charters *out* of the Warsaw Convention, and to study it later with a view toward incorporation in a subsequent convention.

The court below has now, through "broad" construction, inserted a provision which would bring charter relationships into the Convention.

In doing so the court violated Mr. Justice Story's admonition in *The Amiable Isabella*, 19 U. S. (6 Wheat.) 1 (1821):

> "In the first place, *this Court does not possess any treaty-making power.* That power belongs by the constitution to another department of the Government; and to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part a usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty. *Neither can this Court supply a casus omissus in a treaty,* any more than in a law." (Emphasis supplied.) *Id.* at 71.

c. This is a private law treaty which restricts individual rights.

The Warsaw Convention affects only the rights and responsibilities of private individuals. Private law conventions, such as Warsaw, are basically different from public law conventions.[9]

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[9] As Renih Mankiewicz, of the Legal Bureau of ICAO pointed out in an article entitled "Air Law Conventions And The New States", 29 J. Air. L. & Com. 52, 62 (1963) states:

> "The only obligation which the former (a private law convention) imposes on a contracting state is to incorporate the substantive law rules of the convention into its own national law, either by merely ratifying the convention, or by enacting additional legislation when required by the constitutional law of the state concerned or by the convention itself. Once this obligation is complied with, there remains no further international duty for the contracting state arising out of a private law convention except to denounce the latter in the proper way if and when it is desired to modify or amend any national law based on the convention. Public law conventions, on the other hand, normally establish or entail permanent obligations to do, not to do, or to tolerate, certain acts during the lifetime of the convention."

Public international air treaties include The Pan American Convention on Commercial Aviation (47 U. S. Stat. at L. 1901) and The Sanitary Aerial Navigation Convention (49 U. S. Stat. at L. 3279) which impose upon the United States Government certain continuing obligations and responsibilities. In the Warsaw Convention the United States Government has no duties or responsibilities.

The distinction between public and private treaties has been recognized by this Court in *Haver* v. *Yaker*, 76 U. S. (9 Wall.) 32, 34 (1869).[10]

The courts have occasionally interpreted public treaties involving continuing obligations on the part of the contracting government "liberally", see *Factor* v. *Laubenheimer, supra;* and *Bacardi Corporation* v. *Domenech,* 311 U. S. 150 (1940). However, in private rights treaties, the integrity and good faith of the national government are not involved and a different situation is presented.

This Court, in the past, has refused to presume that a treaty intended to abrogate or modify rights unless the intent to do so is unmistakably indicated by direct and unambiguous language. *Perkins* v. *Elg,* 307 U. S. 325, 327 (1939); *Strother* v. *Lucas,* 37 U. S. (12 Pet.) 410 (1938).

In *Strother* v. *Lucas,* this Court said:

> "No construction of a treaty, which would impair that security to private property, which the laws and usages of nations would without express stipulation have conferred, would seem to be admissible further than its positive words require." Id. at 438.

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[10] This Court said:

> "It is undoubtedly true, as a principle of international law, that, as respects the rights of either *government* under it, a treaty is considered as concluded and binding from the date of its signature. In this regard the exchange of ratifications has a retroactive effect, confirming the treaty from its date. But a different rule prevails where the treaty operates on *individual* rights. The principle of relation does not apply to rights of this character, which were vested before the treaty was ratified. In so far as it affects them, it is not considered as concluded until there is an exchange of ratifications . . ." (Emphasis supplied.) See also Charles Pergler, Judicial Interpretation of International Law 13 (MacMillian Co., 1928).

However worthy the intent of the drafters of the Warsaw Convention was and however well-meaning the intentions of our State Department and President when they recommended adherence, the Convention has turned out to be disastrous to the rights of American citizens. The Convention accomplishes nothing for them that they do not have anyway under the now accepted rule of *res ipsa loquitur*. It has even been held not to create a right of action, *Noel* v. *L.A.V.*, 247 F. 2d 677 (2d Cir. 1957), *cert. den.*, 355 U. S. 907 (1957), so that it does not even supply the arguable need for a right of action when an accident has happened in a place with no death law or obscure death law. Its limitation of damages for death of $8,300 is astonishing and unconscionable.

Carrier-imposed limitations of damages violate the public policy of most states of the United States, and, indeed were held to violate federal public policy; *New York Central Railroad Co.* v. *Lockwood*, 84 U. S. (17 Wall.) 357 (1873); *Curtis-Wright Flying Service, Inc.* v. *Glose*, 66 F. 2d 710 (3rd Cir. 1933), *cert. den.* 290 U. S. 696 (1933). The damages limitation of the Warsaw Convention, by its terms, only affects carriers, so that in a very real sense its obnoxious character falls squarely within the condemnation of numerous American public policy cases.

That the Warsaw Convention, with its arbitrary limitation on the common carrier's liability for negligence, represents a radical departure from American law and public policy was recognized in 1948 by the Civil Aeronautics Board which declared that the Convention was to be strictly construed and extended only by formal international agreement.

The C.A.B. said:

> "The rule establishing the invalidity of contracts which attempt to abrogate or limit the liability of a common carrier through the negligence of the carrier

is well established in the United States, . . . (citing authorities)" 10 CAB 783 (1949).[11]

The Board further stated:

> "To the extent that the proposed conditions of carriage would place a limit on liability in cases of non-Warsaw transportation, they represent a step away from the public policy of this country." 10 CAB 788 (1949).

The British Columbia Supreme Court, in 1961, held that the Warsaw Convention and the Carriage by Air Act (1952) R.S.C. Ch. 45, which ratified the Convention on behalf of Canada, were "not dissimiliar to a taxation statute" and "were to be strictly construed, rather than liberally", and therefore held the Convention not applicable. *Stratton* v. *Trans Canada Air Lines*, 7 Avi. Cas. 17,724 (Br. Col. S. Ct. 1961).

That our courts should give a strict construction to treaties violative of private rights and inconsonant with our public policy was recognized by Circuit Judge Jones in his dissent below (A. 118a):

> "If alternative meanings can be placed upon a treaty, the one adopted should, if possible, be that which is least restrictive of the rights of individuals. *Universal Adjustment Corporation* v. *Midland Bank, supra.* The rule that invalidates contract provisions which restrict the rights of passengers to recover for personal injuries is one generally prevailing in the United States. 13 C.J.S. 1182, Carriers § 629. The rule is founded upon public policy. *Aetna Casualty & Surety Co.* v. *Prather*, 59 Ga. App. 797, 2 S. E. 2d 115;

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[11] The views expressed by the CAB, the national agency responsible for air transportation in this country, are entitled to careful consideration by the courts. *Kolovrat* v. *Oregon*, 366 U. S. 187 (1961).

Philippine Air Lines, Inc. v. *Texas Engineering & Manufacturing Co., Inc.*, 5th Cir. 1950, 181 F. 2d 923. Where the meaning of a treaty depends upon construction, as I think is the case here, the meaning adopted should be that which is consistent with a generally prevailing rule of public policy rather than one which should override it."

d. ***The abandonment of our own standards of treaty interpretation in favor of a French law approach was unwarranted.***

In articulating "the primacy of the French legal system" and in finding that this "compels a broad construction of the Convention" the majority of the court below drew attention to Article 36 (A. 22a) of the Convention (A. 69a).

But Article 36 only refers to the language in which the original was to be filed! Nowhere in the Convention is there a provision to the effect that principles of treaty interpretation shall be those followed by French law. Nowhere is there a suggestion that an American court could abdicate its concern for legislative intent and restriction of private rights in favor of the "broad" or "liberal" approach prescribed by French law.[12]

Yet on that basis the court below downgraded the strong evidence of the drafters' intent (e.g. Beaumont said certain delegates to the Warsaw Conference said "the Government draftsmen responsible for the Warsaw Convention did not contemplate charter contracts coming within the provisions of the Convention at all . . .") (A. 94a) in favor of conclusory opinions (including Beaumont's) that the re-

[12] Even Sundberg, the Swedish author relied on by the majority below (A. 69a) was only concerned with the primacy of the French text in resolving *language* differences concerning the meaning of the terms used in the treaty. Nowhere does Sundberg suggest that basic American law concepts of *casus omissus* and legislative intent be abandoned.

lationship between the passengers and Air France *should* come within the Warsaw Convention (A. 97a, 105a-110a).[13]

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[13] The majority opinion below recognizes that there were three sets of contractual relationships involved herein rather than the single, individual passenger relationship contemplated by the drafters of the Convention (A. 70a-80a). But then the majority shifting from legislative intent to broad construction says:

> "The contractual relationship established between Air France and the passengers and evidenced by the individual issuance of these tickets fits the description of the relationship required by the Warsaw Convention." (A. 80a)

Similarly, the majority cites the conclusions of several commentators. Examination of their statements and conclusions reveals recognition by them that the drafters of the Convention intended not to cover charters.

For example, Abrosini (A. 106a) said that the Brazilian proposal at the Warsaw Conference was designed "In order to know if the Convention would be able to be applicable in the case of chartering." Fletamento Y Transporte, Aeronautica Argentina, IDAN/9 p. 3 (Buenas Aires, 1951), cited by Sundberg, *Air Charter* 201 (1961).

Coquoz, author of *Le Droit Prive International Aerien* (Paris, 1938) is another commentator relied on by the majority below (A. 109a-110a). Yet in his book Coquoz said:

> "On the other hand, the acts of CITEJA and of the Conference reveal to us clearly enough that the Convention authors did not intend to regulate chartering." (*Id.* at 93)

It is true that Coquoz went on to say:

> "This does not prevent the Convention from being applicable if the text permits it." (*Id.* at 93)

But this simply illustrates how a French lawyer using a civil law approach might disregard legislative intent in drafting a treaty and yet apply that treaty to a given set of circumstances. Whereas the standard of treaty interpretation under our law is clearly the intent of the parties in entering into the treaty the standard under civil law is far more subjective. See, for example, Article I of the Swiss Civil Code, Von Mehren *The Civil Law System*, 828, 829 (1957), Ballot Beaupre, Le Centenaire du Code Civil (1904), at 27, cited in Von Mehren, *The Civil Law System*, 828, fn. 24 (1957).

5. The legislative history of the Warsaw Convention as well as its language, makes it clear that the drafters did not intend to cover any charter relationships including the type involved herein.

A wealth of historical data is available and will be presented to the Court, if the writ of certiorari is granted, demonstrating that the drafters of the Convention did not intend to cover any charter flights including voyage charter flights of the type involved herein. We recognize that this is not the place to spell out this historical material, but a few highlights are appropriate to demonstrate that the majority of the court below was wrong in its conclusion "that the history of the Convention, before and after Warsaw, shows that the Warsaw Convention applies to a voyage charter flight" (A. 105a), and that the conclusion of Judge Jones, dissenting, was correct that it is "improbable that charter flights were within the contemplation of those who made the treaty" (A. 117a).

A. The continuing study by CITEJA of the charter question before and after the signing of the Convention.

The preparatory work for the Warsaw Convention was done by CITEJA (officially translated as "International Technical Committee of Aerial Legal Experts")[14] CITEJA was created by the First International Conference on Private Air Law in Paris, in 1925. The work of CITEJA resulted in the Warsaw Conference of 1929, which created the Warsaw Convention, but the work of CITEJA continued until 1946.

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[14] National Archives, Department of State Decimal File 1910-29, File No. 579.6L1/24. Hereafter, such files will be referred to in the style: "Archives 579.6L1/24". All such files are from the general records of the United States Department of State and may be examined in the National Archives, Washington, D. C.

The 1925 Paris Conference prepared a preliminary draft of a Convention on the Liability of Air Carriers. It also assigned to CITEJA, for study, the question of "Location d'aeronéf".[15] As pointed out by the court below this term included chartering of aircraft (A. 63a).

In 1926 "Location des aeronéf" was assigned to CITEJA's Second Commission (committee).[16] At a meeting of this Commission, before the Warsaw Conference in May, 1929, DeVos, the Reporter in charge of drafting a proposed convention indicated that chartering of aircraft was not of practical interest for an international convention; that it might become of interest in the future; and that it might be advisable to appoint a reporter on that subject.[17] The President of this Commission, Arendt, concluded that "the question of hiring of aircraft will be examined subsequently."[18]

"Location des aeronéf" remained on the agenda of the Second Commission beyond the Warsaw Conference, through 1946.[18a] CITEJA itself considered the charter question again in 1932, three years after the Warsaw Convention had been signed.

The continued study of the question after the Warsaw Conference had ended is evidence that the question of chartering was not settled in the Convention.

B. The Brazilian proposal.

At the Warsaw Conference itself, in 1929, the question of dealing with chartering was specifically raised and was specifically deferred for later consideration in another convention. It was raised in the form of a proposal made

[15] Archives 579.6L1A/22½.

[16] Archives 579.6L1/24.

[17] Archives 579.6L1A/84, CITEJA Document 4, pages 4-5.

[18] Id. page 8.

[18a] ICAO Document 4003, pp. 67-75.

by the Brazilian delegation, and it was one of four proposed amendments singled out and specified in the "Final Protocol" of the Conference, a formal document signed by all of the delegates present.[19]

The Brazilian delegation pointed out that the draft of the Convention used the word "carrier" which was clear in transportation afforded an individual passenger in accordance with the normal contract of carriage, but which in a three-party charter relationship was ambiguous. The Brazilians pointed out that with charter relationships under some systems of law the owner would be the carrier and under other systems of law the charterer would be considered the carrier.

To cover charters and eliminate the ambiguity the Brazilians suggested a clause defining the word "carrier" to include both owner and charterer in a charter situation.[20] The delegates, including DeVos, were not ready to extend the coverage of the Convention to charter relationships. They wanted to limit themselves to "certain unification rules"; to taking a *first step.* This is apparent from the floor discussion and the specific terms of the Final Protocol, which stated "that the Warsaw Convention only regulates certain questions", . . . "that international air navigation is raising many other questions which it would be desirable to regulate by international understanding;"[21] . . . "that the Warsaw Conference, having taken cognizance of the Brazilian proposal, believing that the question should not be settled in this convention, refers the proposal to CITEJA. . . ."[22]

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[19] See the Minutes of the Conference, English translation, SJX 6, page 401.

[20] SJX 6, page 241.

[21] SJX 6, pages 216-217; State Department Bulletin of Treaty Information #7, Archives 579.6L2/73, pages 28-29.

[22] Ibid.

The Final Protocol, which is the best possible proof of legislative intent, in fact does no more than echo the Minutes of the Conference itself. Speaking from the floor of the Conference Giannini, the Chief of the Italian Delegation, and the Chairman of both the Preparatory Commission and the Drafting Committee, said:

> "With regard to this proposal from Brazil, the Committee was of the opinion that *this problem does not fall under this convention.* . . . the codification of private air law takes place progressively, we are forced to anticipate somewhat and we have contemplated certain problems which affect other conventions. However, as *in this case* it was not necessary to define the 'transporteur' (carrier), . . . we have submitted his proposal to the CITEJA so that it be taken into consideration." (Emphasis supplied.)[23]

Giannini's statement that "this problem does not fall under this Convention . . . in this case it was not necessary to define the carrier" can only mean that in the case of the normal, non-charter relationship there is no question as to the identity of the "carrier". This shows that the Convention is limited to that relationship.

DeVos, who is called the primary author of the Convention by the majority of the court below (A. 93a), referred to the Brazilian proposal on the floor of the Conference. As the floor leader, attempting to push through the legislation with the minimum of changes, he thanked the delegates who had presented amendments and who had withdrawn them "not because they were not justified, but because they were outside the framework of the Convention which limits itself to certain unification rules. . . ."[24] He added "certain amendments appear to us to be justified and very reasonable . . . but mostly for the future work of

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[23] Unofficial translations contained in SJX 4, p. 2, and SJX 6, p. 235.

[24] SJX 6, p. 237.

the CITEJA. Thus, it was the case for some of the amendments presented by the Brazilian delegation,"[25]

Ambrosini, Coquoz, and Drion, all of whom were cited by the majority of the court below, all agreed that the purpose of the Brazilian proposal was to include charters within the Warsaw Convention.[26]

Even apart from its specific reference to the Brazilian proposal the Final Protocol indicates that the Convention deals only with non-charter transportation. Section "B" of the Final Protocol recognized that there were other types of air transportation, which certainly included charter transportation, that should be dealt with in other conventions. Otherwise "B" has no meaning. It provided:[27]

> "B. The Conference, considering the importance from an international standpoint of uniform regulations for transportations by air of every kind,
>
> Recommends
>
> that the International Technical Committee of Aerial Legal Experts prepare a preliminary draft convention on the subject as soon as possible."

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[25] Id. at 238. The defendant below, suggested that in rejecting the Brazilian proposal and in deferring the question for further consideration by CITEJA in another convention, the conference intended to defer questions relating to some types of charters but not the type of voyage charter involved herein. The defendant has ignored the fact that the Brazilian proposal was directed primarily, if not entirely, at voyage charters. Time charters and bare hull charters could not come within the Convention anyway, by virtue of Article 1(2) which required a contract of carriage specifying places of departure, destination, and stops that meet certain geographical requirements. (Vaicoussis, a paper on the liability of the aircraft operator and charterer 12 n. 7 [McGill University 1952], contained in SJX 11.) The Brazilian proposal would not have brought them under the Warsaw Convention. It would have brought voyage charters under the Warsaw Convention.

[26] See n. 13, *supra*, and Drion, Limitation of Liability in International Air Law 133 (1954).

[27] Archives 579.6L2/73, pp. 28-29 containing State Department Bulletin of Treaty Information No. 7, Supplement of October 12, 1929.

C. The delegates to the Warsaw Conference intended to take a limited step.

The Minutes of the Warsaw Conference emphasize and re-emphasize the intention of the delegates to take a limited first step toward what they thought would be "the progressive elaboration of a comprehensive code of private international air law".

Lutostanski, the President of the Conference, in his opening speech said:[28]

> "The questions contained in the draft we have before us are but the beginning, the first fruit of the program undertaken in Paris in 1925, outlined and then executed by the CITEJA." * * * "Your President will be happy if the work of this Warsaw Conference becomes the springboard for a series of conventions on private air law . . ."

DeVos, the Rapporteur of the draft convention in his report to the Conference asked the delegates to:[29]

> ". . . hasten the ratification of this first international law, which shall be the beginning of the Air Code."

Giannini, in his initial report to the Conference, as Chairman of the Preparatory Commission said:[30]

> ". . . we are making a first effort and we must be happy to do it."

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[28] SJX 6, pp. 11-12.

[29] SJX 6, p. 26.

[30] SJX 6, pp. 38-39.

He added:

"[W]e shall propose the following title for the Convention:

"'Convention relating to certain rules on the unification on private air law.'

. . . the title indicates the particular character of the Convention. . . ."[31]

In connection with the formulation of the Final Protocol, Ripert, the Delegate of France, proposed the following 'wish':

"The Conference,

'Considering that the Warsaw Convention only settles certain difficulties relating to air transportation and that international air transportation raises many other questions which should be settled by international agreement.

'Wishes:

'That, through the French Government which took the initiative of calling these Conferences, new conferences should be called subsequently to pursue this task of unification.'"[32]

When the United States adhered to the Warsaw Convention in 1934 it knew of the Brazilian proposal, the action taken on it, and the limited scope of the Warsaw Convention.

The United States had two qualified observers at the Warsaw Conference. Furthermore, multiple copies of the detailed Conference Minutes, containing the Brazilian Proposal and the discussion of it on the floor were received by the State Department and widely distributed among its divisions and other departments of our Government.[33]

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[31] SJX 6, p. 305.
[32] SJX 6, p. 312.
[33] See, Archives 579.6L2/52, 68, 78, and 80.

In addition, numerous copies of the Final Protocol were received both in separate form and annexed to CITEJA publications on the Warsaw Convention.[34]

In addition there is a wealth of evidence from State Department files demonstrating our Government's belief that the Warsaw Convention was but the first of what were to be additional conventions on air law. These include Presidential messages to Congress as well as letters from State Department officials including the Secretary of State.[35]

D. The IATA Questionnaire

Major Beaumont, the representative of the International Air Traffic Association at the Warsaw Conference, and a member of its Legal Committee, in 1932 presented a report to IATA.[36]

Beaumont had attempted to review with a representative group of delegates to the Warsaw Conference the question of whether the Conference had intended to cover

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[34] See, Archives 579.6L2/36, 37, and 39.

[35] See, Archives 579.6L1A/114½, containing Senate Document #121, 71st Congress, 2d Sess. (1930); Archives 579.6L1A/148, S. Rep. No. 1404, 71st Congress, 3d Sess. (1931); Archives 579.6L1A/242, H. R. Rep. No. 800, 72nd Cong. 1st Sess. (1932); Archives 579.6L1A/145:

> "The delegates to the Warsaw Conference stated that as international air navigation is raising many other questions which it would be desirable to regulate by international understandings they recommended that other Conferences be called to continue the work of unification of private aerial law. When it is considered that there will probably be separate conventions on various other phases of private aerial law, the magnitude of the work undertaken by the International Technical Committee of Aerial Legal Experts will be readily appreciated." *Id.* at 3.

[36] 17 IATA Inf. Bull. 42 (Hague 1932). See the report of this bulletin in Sundberg, *Air Charter*, 201 (1961).

charters in the Warsaw Convention. His report indicates that the drafters did not contemplate charters coming within the provisions of the Convention at all. The report says, in part:

> "The replies received to these enquiries in the first instance seemed to indicate that the Government draftsmen responsible for the Warsaw Convention did not contemplate charter contracts coming within the provisions of the Convention at all, . . ."[37]

IATA, reflecting Beaumont's observations, evinced considerable concern about whether or not the Warsaw Convention covered charter flights, and, particularly, voyage charters.

In a questionnaire directed to CITEJA,[38] IATA expressed its belief that the Warsaw Convention had not "taken into consideration" charters or hire of aircraft, raised questions about the legal relationships involved in these contracts, and asked CITEJA "*whether it would not be desirable to prepare a special international convention . . . on contracts of charter* and lease of aircraft, in order to settle and make clear the questions giving rise to *doubt* . . . (particularly in the cases mentioned in the above questionnaire)" (Emphasis supplied.)

In his Report to IATA to which the questionnaire was attached Beaumont said:

> "The position is this: the *Convention of Warsaw has not taken into consideration special charters* or hiring of aircraft to people under various circumstances *and therefore even my valued colleagues . . . and all the*

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[37] Quoted from Sundberg, *Air Charter*, n. 59, p. 201.

[38] Archives 579.6L1A/339, 344.

. government lawyers whom we have consulted did not really know what the legal position is concerning these contracts.'' (Emphasis supplied.)[39]

Thus the airlines themselves and their expert, Beaumont, who attended the Warsaw Convention as their representative, knew that the Warsaw Convention had not taken charters into consideration.

The majority of the court below takes the view that the ''post-Warsaw meetings show a concern, similar to that expressed by the Brazilian delegation, as to whether charterers, not charter *flights* are covered by the convention'' (A. 93a). This is plainly rebutted by the IATA questionnaire and its Decision #8, and the great concern indicated therein that the whole field of chartering was not dealt with in the Convention. The airlines' position in charter relationships such as the one at bar was as owner, and not as charterer, and the ''urgent necessity'' referred to related to their liability, because of a fear that charter relationships were not covered at all.[40]

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[39] On September 27 and 28, 1933, only six months before President Roosevelt sent the Warsaw Convention to the Senate for advice and consent to adherence, the International Air Traffic Association met in London and made the following decision:

> "Decision #8.—*The Warsaw Convention and special charter contracts.* In order to cure the difficulties experienced by air carriers and their clientele, under the regime of the Warsaw Convention concerning charter contracts and leasing of aircraft, the members of IATA are asked to point out to their governments the *urgent necessity of establishing an international convention treating exclusively with this matter.*" (Emphasis supplied.) (Archives 579.6L1A/444, pp. 18-19.)

[40] In making that distinction the court below also overlooked many statements in the historical record which clearly indicate that the whole subject matter of charters had not been covered by the Warsaw Convention. For example, Giannini, in 1933 stated that the "question consisted in seeing whether charter-parties should be introduced in air law. . . ." (Archives 579.6L1A/382; CITEJA Doc. 197).

E. Cogliolo's conclusions.

The great concern of the airlines that charter relationships were not covered by the Warsaw Convention was referred in 1933 to CITEJA for study. The matter was referred to Professor Cogliolo of Italy who was appointed Reporter on the charter question, for CITEJA's Second Commission. Cogliolo had been active in CITEJA from its very beginning.[41]

Cogliolo carefully considered the IATA questionnaire and the entire subject of charters. He filed two reports, one in 1936 and one in 1937, which leave no doubt whatsoever but that in his view, as the responsible Reporter on the question, voyage charter flights, of the kind involved herein were not covered by the Warsaw Convention.

The majority opinion of the court below discussed Cogliolo and took a very narrow and selective view of the plain import of his written reports. Indeed the court relied on a section of his report that did not relate at all to a passenger voyage charter (A. 99a-100a), but related to a shipper of goods who instead of shipping in the usual way rented a given space in the aircraft. The Warsaw Convention covers the shipment of goods as well as the transportation of passengers and in this situation, *which is not a charter at all,* and which bears no resemblance to the situation at bar, Cogliolo concluded that the Convention applies. But in the charter situation, including the voyage charter situation, Cogliolo concluded, clearly and specifically, that "the Warsaw Convention cannot be applied" unless it was to be amended.[42]

It is important to note that the statements made by DeVos, in the course of these CITEJA discussions, sug-

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[41] Archives 579.6L1/24; 579.6L1A/60.

[42] Archives 579.6L1A/1302; CITEJA Doc. 328, May 1937; SJX 12. See the Opinion of the majority of the court, below, where in footnote 56 the court quotes some of the relevant sections (A. 100a-101a).

gesting that the Warsaw Convention did apply to charters, which were relied upon by the court below, were rejected by Cogliolo in his report on the question (A. 98a-100a).

As pointed out by the majority of the court below the first five conclusions in Cogliolo's 1937 report, which clearly demonstrate that the Warsaw Convention does not apply to charters, impelled the defendant to contend that they related only to a type of voyage charter known in Europe, and referred to by the court as "European charters where the charterer is not the passenger but may issue tickets to third parties in his own name, i.e. the charterer contracts with the passengers to transport them" (A. 101a).

It is true that the defendant, below, did so argue, and did attempt to demonstrate a distinction between the "European charters" and the type it said was involved herein. In doing so the defendant, of course, implicitly admitted that the Warsaw Convention did not apply to these "European charters" and thus that it did not apply to "all international transportation", as it had originally contended.

The point is interesting for several reasons. First the so-called "European charter" may be extensively used in the United States if this Court upholds recent Civil Aeronautics Board orders. But more important the court below, demonstrated its failure to apply the proper standard of treaty interpretation—the intent of the drafters. The drafters chose not to get involved in distinctions between types of charters, but to defer such questions for a later convention. Finally the position of the defendant in the court below demonstrates that to sustain the application of the Warsaw Convention to a voyage charter of the type involved herein a court must construe the charterer, in this case the Atlanta Art Association, into a position of non-existence.

F. The six efforts to draft a new convention relating to charters.

Following the deliberations of CITEJA's Second Commission and Professor Cogliolo's two reports no less than six serious efforts were made by CITEJA, its Rapporteurs, or its successor, the Legal Committee of the International Civil Aviation Organization, to formulate a convention that would deal with charter relationships.[43]

These efforts resulted in draft conventions spelling out the liability of the airline to the passenger in a voyage charter of the kind involved herein. These efforts are not seriously considered in the majority opinion, below, but they raise an obvious question. Why were six official efforts made to formulate such a convention if the Warsaw Convention already specified this liability?

The majority opinion below virtually skips these efforts and proceeds to a consideration of the International Conference at the Hague in 1955 which produced the Hague Protocol (A. 101a-102a). Even here the majority opinion ignores the plain impact of the historical record. The question of charters came up at the Hague Conference, but again it was deferred.

The "Final Act" of the Hague Conference provided:

> "THE CONFERENCE
>
> HAVING CONSIDERED the report of the Sub-Committee of the Legal Committee of the International Civil Aviation Organization on the charter and hire of aircraft,

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[43] Archives 579.6L1A/1655, 1814; CITEJA Doc. 423, p. 2, contained in SJX 9; Sundberg, *Air Charter* 388 (1961); Reemts, *Charter, Hire and Interchange of Aircraft* 10 (McGill 1956), contained in SJX 11; CITEJA Doc. 445 contained in ICAO Doc. 4003 at pp. 29-66, SJX 13; ICAO Doc. 4003, pp. 67-75, SJX 13; ICAO Doc. 6024-LC/121, SJX 14; ICAO Doc. 7229-LC/133, p. 197, SJX 14.

AND BEING OF THE OPINION that the matter is of too great complexity to permit the insertion of provisions relating thereto in the Protocol to amend the Warsaw Convention,

BUT CONSIDERING that the matter is of considerable practical importance in view of the extent of charter and hire arrangements and requires further study,

RECOMMENDS to the International Civil Aviation Organization that this subject should be further studied by this organization.'"[44]

G. The language and structure of the treaty.

The foregoing consideration of history, both before and after the enactment of the Warsaw Convention supplements the significance of the language of the treaty itself. A fair reading of the entire Warsaw Convention demonstrates that it was exclusively concerned with unifying certain rules in normal, individual passenger travel. The Convention turns not on flights or travel, but on the traditional definite contract of carriage between passenger and carrier. The only two parties mentioned are the airline and the passenger and the only contract mentioned is the one between them. Charterers are not mentioned; nor are charter contracts or charter flights.

Furthermore, the structure of the convention is in terms of two parties and a two party relationship and a single definite contract, whereas, even as stated in the majority opinion below, a charter arrangement, including the particular one involved herein, involves three parties, the owner of the aircraft, the charterer, and the passenger. Furthermore, it involves at least two contracts, the one between the owner and the charterer, and one between the charterer and the passenger.

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[44] ICAO Document 7686, pp. 19-32, SJX 14.

Conclusion

A divided Court of Appeals after a two and a half year consideration of the question evolved an erroneous interpretation of an important question under an important international treaty in which the United States has a great interest. The case itself involves sixty-two deaths. The amount of charter flying has rapidly increased until it is now a substantial part of all international air travel. Depending on questions now before this Court the amount of air charter transportation may increase even further. This court now has this same treaty under consideration on a question that is not unrelated to the question herein. The court should grant this petition for a writ of certiorari and review the determination by the court below that the Warsaw Convention covers charter flights.

Respectfully submitted,

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